

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
APPENDIX**

74-1623

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
UNITED STATES OF AMERICA,

Appellee,

-against-

RAFAEL NAVEDO,

Appellant.

-----x
Docket No. 74-1623

APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
FEDERAL DEFENDER SERVICES UNIT
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E. THOMAS BOYLE,

Of Counsel

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JUDGE BRIEANT 73 CRIM. 964

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	<i>For U. S.:</i>
vs.	James P. Lavin, AUSA
RAFAEL NAVEDO - All Cts ✓	264-6562
MIGDALIA REYES- Ct.1 ✓	

DATE	PROCEEDINGS
0-15-73	Filed indictment. Deft. Navedo (atty. present) Pleads not guilty. Bail fixed at \$10,000 P.R.B. to be co signed by employer & sister. Bail to be posted Oct. 18, 1973 at (5:P.M.) Deft. released until he posts bail. Brieant, J.
12-11-73	RAFAEL NAVEDO - (Atty. Present) Deft. PLEADS GUILTY to ct. 1 only. Court res. Dec. On consent of deft. & Counsel. P.S.I. Order. Sentence adj'd until 1-25-74 . Bail cont'd. BRIEANT, J.
2-15-74	NAVEDO - Filed CJA Form # 20, appointment and voucher.
3-18-74	Jury Trial begun before BRIEANT, J. As to both Defts.

DATE	PROCEEDINGS	CLERK'S FEES	
		PLAINTIFF	DEFENDANT
3-19-74	Trial cont'd and concluded. Jury verdict. Deft. NAVEDO - Guilty as charged. P.S.I. Ordered. Sentence date set for 4-29-74. Bail cont'd. Deft. RAYES - NOT GUILTY. BRIEANT, J.		
3-28-74	MIGDALIA REYES - Filed CJA Form #20, Appointment and voucher for Atty. Fees.		
3-28-74	NAVEDO - Filed CJA Form # 21 Authorization and voucher for counsel fees.		
4-12-74	RAFAEL NAVEDO - Filed defts. affdvt and notice of motion to set aside verdict of jury.		
5-1-74	RAFAEL NAVEDO - Filed pltfs. reply affdvt.		
5-1-74	RAFAEL NAVEDO - Filed MEMO END on deft. motion filed 4-12-74. Motion denied. *** BRIEANT, J.		
4-30-74	RAFAEL NAVEDO - Filed financial affdvt.		
4-30-74	RAFAEL NAVEDO - Deft. (Atty Present) Filed Judgment and issued copies. It Is Adjudged that the deft. is hereby committed to the custody of the Atty. Gen. or his authorized representative for imprisonment for a period of 3 yrs. on ct. 1; 5 yrs. on ct. 2; 3 yrs. on ct. 3, sentences to run conc. w/ each other and conc. w/ the sentence imposed on 74 cr. 360 this day. Pursuant to the provisions of 21:841, deft. is placed on S/P for a period of 6 yrs. to commence upon expiration of confinement. Deft. remanded in lieu of bail pending appeal fixed in the amt. of \$50,000. BRIEANT, J.		
5-2-74	RAFAEL NAVEDO- Filed notice of appeal from final judgment of April 30-74; leave to proceed in forma pauperis is granted-BRIEANT J. dtd: April 30-74 (memo. endorsed). m/n.		
5-8-74	RAFAEL NAVEDO - Filed copy of J/C with marshals return deft. delivered to F.D.H. 4-30-74.		

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

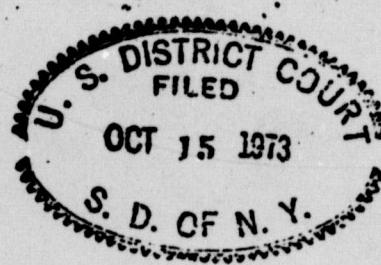
73 CRIM. 964

-v-
RAFAEL NAVEDO and
MIGDALIA REYES,

: INDICTMENT

: S73 Cr.

Defendants . . .



The Grand Jury charges:

1. From on or about the 2nd day of April, 1973 and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York,

RAFAEL NAVEDO and
MIGDALIA REYES

the defendant and others to the Grand Jury unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendant unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule I and II narcotic drug controlled substances the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

Lu. 5/17/1

intent to distribute narcotic drug.)

JPL:art

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

1. On or about the 5th day of April, 1973 the defendant RAFAEL NAVEDO delivered a package and accepted money at 1581 Fulton Avenue, Bronx, New York.
2. On or about the 17th day of April, 1973 the defendant MIGDALIA REYES had a conversation at 892 East 176th Street, New York, New York.
3. On or about the 18th day of April, 1973 the defendant RAFAEL NAVEDO entered a truck and drove to the vicinity of 1581 Fulton Avenue, Bronx, New York.

(Title 21, United States Code, Section 846)

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk
By B. Edwards, Deputy Clerk

SECOND COUNT

73

Form 1

The Grand Jury further charges:

On or about the 18th day of April, in the Southern District of New York, RAFAEL NAVEDO, the defendant, did unlawfully, wilfully and knowingly carry a firearm during the commission of a felony, for which he could be prosecuted in a court of the United States; to wit, Title 21, United States Code, Section 846.

(Title 18, United States Code, Section 924(c)(2).)

THIRD COUNT

IN

(21, US
841(b))

The Grand Jury further charges:

On or about 18th day of April, 1973, in the Southern District of New York, RAFAEL NAVEDO, the defendant, unlawfully, wilfully and knowingly did forcibly assault, resist, oppose, impede, intimidate and interfere with, by use of a deadly and dangerous weapon, to wit, a revolver, William Rawald, a person aiding, acting with and on behalf persons designated in Section 1114 of Title 18, United States Code, to wit, officers and employees of the Bureau of Narcotics and Dangerous Drugs, while William Rawald and said officers and employees were engaged in and on account of the performance of their official duties.

(Title 18, United States Code, Section 111)

Luis Alfonso
Foreman

Paul J. Curran
PAUL J. CURRAN
United States Attorney

United
SOUTHERN

THE UNITED

RAFAEL R.
MIGDALIA

PAUL
A TRUE BILL



CRIM. 904

Form No. USA-33s-274 (Ed. 8-23-58)

United States District Court
SOUTHERN DISTRICT OF NEW YORK
UNITED STATES OF AMERICA

vs.

J. NAVARRO and
ELIA REYES,

Defendants.

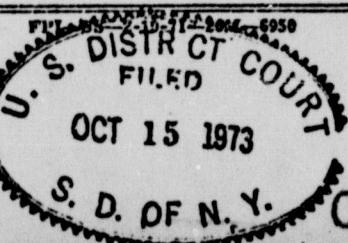
INDICTMENT

USC 812, 841(a)(1)
(b)(1)(A) and 846

AUL J. CURRAN
United States Attorney.

BILL

Foreman.



ONLY COPY AVAILABLE

JUDGE BRIEANT

10/13/73 Deft. Navarro (atty. Michael Hermann, present)
Plaintiff not guilty. Trial date set 10/23/73
PRB. to be conducted by employees & relatives.
Penalty to be imposed 10/17/73 at 11/17/73
Deft. released until trial date. Plaintiff?

10/21/73 Deft. Navarro (atty. Barry Curran) present
Plaintiff pleads guilty to Ct. 1 on
Court reserves decision. On co
of deft & counsel. P.S.I. ordered.
Sentence adj'd. to 1/25/74
Bail cont'd.

Brieant, Jr.

3/18/74 Both defts. (attys present)
Jury trial begun
3/19/74 Trial cont'd. & concluded.
(c) Jury verdict Deft. Navarro Guilty, etc.
PSI ordered. Sent. adj'd. to April 2.
Bail cont'd.
Deft. Reyes - not guilty.

4/30/74 Deft. Navarro (Michael Hermann) present.
Rosa Hickey, interpret. Sent 3 yrs
(d) 5 yrs Ct 2; 3 yrs Ct 3 consecutive

Brieant

2 CHARGE OF THE COURT

3 THE COURT: Mrs. Zagoreos, and members of the
4 jury: We are now at that stage in the trial where you
5 will soon undertake your final function as jurors.

6 Here you perform one of the most sacred
7 obligations of citizenship, and that is acting as ministers
8 of justice. You are to discharge this final duty in an
9 attitude of complete fairness and impartiality, and
10 as was emphasized by me when you were first selected,
11 without bias or prejudice for or against the Government
12 or any defendant as parties to this controversy.

13 Let me state the fact that the Government is
14 a party entitled also to no greater consideration than
15 that accorded to any other party to a litigation. By the
16 same token, it is entitled to no less consideration. All
17 parties, individuals and Government alike, stand as
18 equals before the bar of justice.

19 Your final role here is to decide and pass upon
20 the fact issues in this case. You are the sole and
21 exclusive judges of the facts. You determine the weight
22 of the evidence, you appraise the credibility or truth-
23 fulness of the witnesses, you draw the reasonable
24 inferences from the evidence, and you resolve such
25 conflicts as there may be in the evidence.

2 I shall later tell you how you determine the
3 credibility of witnesses. My final function is to
4 instruct you as to the law, and it is your duty to
5 accept these instructions as to the law and to apply them
6 to the facts as you may find them.

7 Now, you are not to consider any one instruction
8 which I give you alone as stating the law, but you must
9 consider all of my instructions taken together as a
10 whole.

11 With respect to any fact matter, it is your
12 recollection and yours alone that governs. Anything
13 that the lawyers either for the Government or a defendant
14 may have said with respect to matters in evidence, whether
15 during trial, in a question, in argument, or in summations,
16 is not to be substituted for your own recollection of the
17 evidence.

18 So, too, anything that I might say during the
19 trial, or anything I might refer to during the course
20 of these instructions, as to matter in evidence is not
21 to be taken in lieu of your own recollection.

22 Now, the attorneys not only have their right,
23 but it is their duty to make objections and to press
24 whatever legal theories they may have. They are simply
25 performing their duty. Any evidence as to which

2 an objection was sustained by the Court, and any evidence
3 ordered stricken out by the Court, must be disregarded
4 in its entirety.

5 Put out of your minds any exchanges which
6 may have occurred during the trial between the lawyers
7 or between any attorney and the Court. It is not my
8 function to favor one side or another, or to criticise
9 anybody in any way whatsoever, or to indicate to you,
10 the jury, in any way that I have any opinion as to the
11 credibility of any witness, or as to the guilt or
12 innocence of a defendant. That is your function, yours
13 alone, and I leave it entirely with you.

14 So please don't assume that I hold any opinion
15 in this case, and please don't reach any conclusion that
16 I may have some attitude, or that I may tend to favor
17 one side or the other in the case. I don't.

18 Of course, as I told you earlier, the indictment
19 here itself is no evidence of the crimes charged. Instead,
20 an indictment is merely the method or procedure under
21 which the law provides for persons accused of crimes by
22 a grand jury to be brought into court to have their guilt
23 or innocence determined by a trial jury such as
24 yourselves.

25 Therefore, the indictment must be given no

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2 evidentiary value, but shall be treated by you solely as
3 an accusation. It is not evidence or proof of a
4 defendant's guilt, and no weight or significance
5 whatsoever is to be given to the fact that an indictment
6 has been returned against a defendant. They have each
7 pleaded not guilty, and thus the Government has the
8 burden of proving the charges beyond a reasonable doubt.

9 A defendant does not have to prove his or her
10 innocence. On the contrary, a defendant is presumed to
11 be innocent of the accusations contained in the indictment.
12 This presumption of innocence was in his favor at the
13 start of the trial, as I believe I told you before, it
14 continued in his favor throughout the trial, and it is
15 in his favor now and remains in his favor during the
16 course of your deliberations in the jury room. And the
17 presumption of innocence is removed only if and when
18 you, the jury, are satisfied that the Government has
19 sustained its burden of proving the guilt of a defendant
20 beyond a reasonable doubt.

21 Of course, unless you are so convinced you
22 must find him or her not guilty.

23 Now, the question naturally comes up, what is
24 a reasonable doubt? Well, members of the jury, those
25 words almost define themselves. That is, a doubt founded

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2 on reason arising out of the evidence in the case or the
3 lack of evidence. It is a doubt which a reasonable
4 person has after carefully weighing all the evidence.
5 Reasonable doubt is a doubt that appeals to your reason,
6 to your judgment, to your common sense, and your
7 experience. It is not caprice or whim or speculation
8 or conjecture or suspicion. It is not an excuse to avoid
9 performance of an unpleasant duty, and it is not sympathy
10 for a defendant.

11 If after a fair and impartial consideration
12 of all the evidence you can candidly and honestly say
13 you are not satisfied with the guilt of a defendant,
14 that you don't have an abiding conviction of a defendant's
15 guilt of a particular charge, in sum, if you have such
16 a doubt as would cause you as prudent persons to hesitate
17 before acting in matters of importance to yourself, then
18 you have a reasonable doubt, and in that circumstance it
19 is your duty to acquit.

20 On the other hand, if after such an impartial
21 and fair consideration of all the evidence you can
22 candidly and honestly say you do have an abiding conviction
23 of a defendant's guilt, such a conviction as you would
24 be willing to act upon in important and weighty matters
25 of the personal affairs of your own life, then you have

2 no reasonable doubt and under those circumstances it is
3 your duty to convict.

4 Reasonable doubt does not mean a positive
5 certainty, or beyond all possible doubt. If that were
6 the rule few people, however guilty they might be, would
7 ever be convicted, because it is practically impossible
8 for a person to be absolutely and completely convinced
9 of any controverted fact which by its nature is not
10 susceptible to mathematical proof.

11 For that reason the law in a criminal case is
12 that it is sufficient if the guilt of a defendant is
13 established beyond a reasonable doubt, not beyond all
14 possible doubt.

15 The indictment in this case, members of the
16 jury, contains three counts, and each count is a separate
17 crime, and they each must be considered separately. The
18 indictment names two defendants, Mr. Navedo and Miss
19 Reyes. Miss Reyes is named only in Count One. They are
20 the only defendants on trial before you, and they are
21 the only persons whose guilt or innocence you will be
22 asked to announce in your verdict. Although, as I will
23 explain to you shortly, in considering their guilt or
24 innocence of Count One you may have to determine the
25 nature of the participation, if any, of the unidentified

2 person referred to as Roy, who was never apprehended.

3 In the determination of innocence or guilt,
4 you must bear in mind that guilt is personal. The guilt
5 or innocence of a defendant on trial before you must be
6 determined separately with respect to him, solely on the
7 evidence presented against him, or the lack of evidence.

8 The case of a defendant stands or falls upon
9 the proof or the lack of proof of the charges against
10 him or her, and not against somebody else.

11 The guilt or innocence of each defendant on
12 trial here must be determined by the jury solely on the
13 evidence introduced against him or her, or the lack
14 thereof, and not against somebody else.

15 Each defendant has a constitutional right
16 not to give evidence in their trial, and you are to
17 draw no inference as to his or her guilt or innocence
18 because he or she did not take the stand.

19 Title 21 of the United States Code, Section
20 841, which applies to this case, provides in pertinent
21 part as follows:

22 "It shall be unlawful for any person knowingly
23 or intentionally to distribute or possess with intent
24 to distribute a controlled substance."

25 Section 812 thereof defines "controlled

2 substances" to include the narcotic drug cocaine.
3 However, procaine, or any of the other matters mentioned
4 in connection with Exhibit 1 B, by the chemist who
5 testified here this morning, are not controlled substances.

6 Section 846 makes it a crime to conspire or
7 agree to commit certain crimes, including the crime
8 defined in Section 841.

9 Now, Section 924(c) of Title 18, United States
10 Code, applicable to Count Two, provides in part that any
11 one who carries a firearm unlawfully during the commission
12 of any felony for which he could be prosecuted in a court
13 of the United States is guilty of a crime.

14 Insofar as concerns Count 3, the applicable
15 statute is Section 111 of Title 18, which provides in
16 pertinent part "whoever forcibly assaults, resists,
17 opposes, impedes, intimidates or interferes with any person
18 designated in Section 1114 of this Title while engaged
19 in or on account of the performance of his official
20 duties, and in the commission of any such acts, uses a
21 deadly or dangerous weapon, is guilty of a crime."

22 Section 1114 of Title 18, United States Code,
23 designates among other people an officer or employee of
24 the Bureau of Narcotics and Dangerous Drugs.

25 Now, you have heard testimony that the person

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2 allegedly assaulted, resisted, interfered with, etcetera,
3 was a New York police sergeant, assigned to and working
4 for the New York Joint Task Force of the United States
5 Department of Justice.

6 Now, I instruct you as a matter of law that
7 in such a case that if you find Sergeant Rawald was a
8 person acting in cooperation with and under the control
9 of federal officers, he was as such under the protection
10 of Section 111 of Title 18, United States Code.

11 In other words, a New York police officer on
12 loan to the federal law enforcement agency, and acting
13 in the Joint Task Force, is to be treated by you the same
14 as if his permanent job was in this case employment with
15 the Bureau of Narcotics and Dangerous Drugs as a special
16 agent.

17 Now, members of the jury, I will turn to Count
18 One, the conspiracy charge. The indictment reads as
19 follows with respect to Count One:

20 "The grand jury charges: 1. From on or
21 about the second day of April, 1973, and continuously
22 thereafter up to and including the date of the filing
23 of this indictment,"-- and that date was October 15,
24 1973 -- "in the Southren District of New York, Rafael
25 Navedo and Migdalia Reyes, the defendants, and others to

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2 the grand jury unknown, unlawfully, intentionally and
3 knowingly combined, conspired, confederated and agreed
4 together, and with each other, to violate Sections 812,
5 841(a)(1) and 841(b)(1)(A) of Title 21, United States
6 Code.

7 "2. It was part of said conspiracy that the
8 said defendants unlawfully, intentionally and knowingly
9 would distribute and possess with intent to distribute
10 Schedule 1 and 2 narcotic drug controlled substances,
11 the exact amount thereof being to the grand jury unknown,
12 in violation of Sections 812, 841(a)(1) and 841(b)(1)(A),
13 Title 21, United States Code.

14 "Overt Acts: In furtherance of the said
15 conspiracy and to effect the objects thereof, the
16 following overt acts were committed in the Southern
17 District of New York.

18 "2. On or about the 17th day of April, 1973,
19 the defendant Migdalia Reyes had a conversation at 891
20 East 176th Street, New York, New York.

21 "3. On or about the 18th day of April, 1973,
22 the defendant Rafael Navedo entered a truck and drove to
23 the vicinity of 1581 Fulton Avenue, Bronx, New York."

24 Before you may convict either of the defendants
25 under Count One, the following essential elements must be

2 established to the jury's satisfaction beyond a reasonable
3 doubt. First, you must find the existence of the
4 conspiracy charged. That is, a conspiracy to distribute
5 or possess cocaine.

6 Second, you must find that the particular
7 defendant whose guilt or innocence you are considering
8 knowingly and wilfully associated himself or herself
9 with the conspiracy and became a member.

10 And, finally, you must find that one of the
11 conspirators committed at least one of the overt acts
12 set forth in the indictment at or about the time and
13 place alleged.

14 I shall presently refer to the overt acts.

15 If the Government fails to establish each of
16 these three essential elements beyond a reasonable doubt
17 as to either defendant, you must acquit that defendant
18 on this count. If it succeeds, your duty is to convict
19 him or her on this Count One.

20 The gist of the crime of conspiracy is the
21 unlawful combination or agreement of two or more persons
22 to violate the law. Whether or not the defendants
23 accomplished what it is alleged they conspired to do is
24 immaterial to the question of their guilt or innocence.
25 A conspiracy is sometimes called a partnership in criminal

2 purposes in which each member becomes the agent of every
3 other member. To establish a conspiracy the Government
4 is not required to show that two or more persons have
5 sat around a table and entered into a solemn compact orally
6 or in writing, stating that they have formed a conspiracy
7 to violate the law, setting forth details of the plans,
8 the means by which the unlawful project is to be carried
9 out, or the part to be played by each conspirator. Indeed,
10 it would be extraordinary if there were a formal document
11 of that kind, or specific oral agreement.

12 Your common sense will tell you that when people
13 in fact undertake to enter into a criminal conspiracy much
14 is left to the unexpressed understanding. Conspirators
15 don't usually reduce their agreements to writing, or
16 acknowledge them before a notary public, nor do they
17 publicly broadcast their plans.

18 From its very nature a conspiracy is almost
19 invariably secret, in its origin and in its execution.
20 It is sufficient to satisfy the first element of this
21 crime of conspiracy if two or more persons in any manner
22 through any contrivance, impliedly or tacitly, come to
23 a common understanding to violate the law; express
24 language or specific words are not required to indicate
25 assent to or attachment to a conspiracy. Nor is it

2 required that you find all the co-conspirators alleged
3 in the indictment joined in the conspiracy in order to
4 find that a conspiracy existed.

5 You need only find that one of the defendants
6 entered into an unlawful agreement with one or more other
7 persons in order to find that a conspiracy existed.

8 In determining whether there has been an un-
9 lawful agreement, you may judge acts and conduct of the
10 alleged co-conspirators which are done to carry out an
11 apparent criminal purpose. The adage "Actions speak
12 louder than words" is applicable here.

13 Usually, the only evidence available is that
14 of disconnected acts which however when taken together
15 in connection with each other may show a conspiracy to
16 secure a particular result as satisfactorily and as
17 conclusively as more direct proof would show.

18 The offense is complete when the unlawful
19 agreement is made and any single overt act to effect the
20 objective of the conspiracy is thereafter committed by
21 at least one of the co-conspirators.

22 Success of the venture may be the best proof
23 of the existence of the agreement. In determining whether
24 the conspiracy charged in this indictment actually existed,
25 you may consider the evidence of the acts and conduct of

2 the alleged conspirators as a whole, and the reasonable
3 inferences to be drawn from such evidence, but it is
4 not necessary that the Government prove that the
5 conspiracy succeeded, or even that the conspirators were
6 actually in the possession of any cocaine.

7 If upon consideration of the evidence you find
8 beyond a reasonable doubt that the minds of at least two
9 of the alleged conspirators met in an understanding way
10 and that they agreed, as I have explained the conspirator-
11 ial agreement to you, to work together in furtherance
12 of the unlawful scheme alleged in the indictment, then
13 proof of the existence of the conspiracy is complete.

14 Here in this case the Government contends that
15 these two defendants, and the person referred to by the
16 name of Roy, who was never apprehended, were the
17 conspirators. In order to convict either of these
18 defendants you must find, with respect to Count One,
19 that that particular defendant conspired either with the
20 other defendant or the person known as Roy. It takes at
21 least two conspirators for there to be a criminal
22 conspiracy. Here these two on trial and Roy are the only
23 persons whom the jury may find to be conspirators.
24 There is no basis to assume the presence or participation
25 of any other or additional person.

2 If you do conclude that a conspiracy as
3 charged did exist, you must next determine whether each
4 defendant on trial before you was a member -- that is,
5 whether he or she participated in the conspiracy with
6 knowledge of its unlawful purpose and in furtherance of
7 its unlawful objectives. To find a defendant's
8 membership in a conspiracy, you must find that he
9 wilfully, knowingly and intentionally participated
10 therein. Thus, mere knowledge by a defendant of the
11 existence of a conspiracy, or of any illegal act on the
12 part of an alleged conspirator, or mere association with
13 one or more of the conspirators, is not sufficient to
14 establish his membership in the conspiracy.

15 The Government must establish beyond a
16 reasonable doubt that the defendant, aware of its basic
17 purpose and objectives, entered into the conspiracy with
18 a specific criminal intent -- that is, with a purpose
19 to violate the law. So, if a defendant with understanding
20 of the unlawful characteristics of the conspiracy
21 intentionally engages, advises, or assists, for the
22 purpose of furthering the illegal undertaking, he or
23 she thereby becomes a knowing and wilful participant
24 and a conspirator.

25 Running an errand, such as going for the cutting

2 agent, or for the stuff itself, or sending somebody else
3 to do so, could be considered as evidence of intentional
4 participation in the conspiracy.

5 In determining whether a defendant was a
6 member of a conspiracy you may consider all the evidence
7 before you in the case, except where I have given you
8 specific limiting instructions that certain evidence is
9 not to be considered, and I will return to that topic
10 shortly.

11 Assuming first that you found the alleged
12 conspiracy existed, and second that as to the defendant
13 under consideration that he or she was a member of that
14 conspiracy, I will now take up with you the third element,
15 and that is the requirement of an overt act. An overt
16 act is any step, action or conduct which is taken to
17 achieve, accomplish or further the objective of the
18 conspiracy. The purpose of requiring proof of an overt
19 act is that while parties might conspire and agree to
20 violate the law, after they have done so they might
21 change their minds and do nothing to carry it into effect.
22 In that case there wouldn't be any crime. The crime
23 only is complete when a member of the conspiracy takes
24 an overt act in furtherance thereof.

25 The overt act need not be criminal in itself,

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2 nor need it be the very objective of the conspiracy.
3 There are two overt acts before you. One is the assertion
4 that on or about the 17th day of April, 1973, defendant
5 Migdalia Reyes had a conversation at 892 East 176th
6 Street, New York, New York. The conversation specified
7 therein, members of the jury, is supposed to have been
8 with Angel Rodriguez at the social club.

9 The other overt act is on or about the 18th
10 day of April, 1973, the defendant Rafael Navedo entered
11 a truck and drove to the vicinity of 1581 Fulton Avenue,
12 Bronx, New York.

13 Proof of either one of the overt acts, and
14 proof that the act was committed in furtherance of the
15 conspiracy, would satisfy this requisite element.

16 The guilt of the conspirator is not governed
17 by the extent of duration of his or her participation
18 in the conspiracy, nor whether he or she had knowledge
19 of all the operation itself. Even if one joined the
20 conspiracy after it was formed and was engaged in it
21 to a degree more limited than that of the other co-
22 conspirators, he is equally culpable so long as he was
23 a co-conspirator. Each member of a conspiracy may
24 perform separate and distinctive acts at different times
25 and at different places. Some conspirators may play

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2 major roles, while others have minor parts. In other
3 words, it is not required that a person be a member of
4 the conspiracy from its very start. He may join it at
5 any point during its progress and be held responsible
6 for all that has been done before he joined and all
7 that may be done thereafter ~~during its existence~~, and
8 while he remains a member.

9 Simply stated, using the partnership analogy
10 again, by becoming a partner he assumes all the
11 liabilities of a partnership, including those that
12 occurred before he became a member.

13 Thus, if you find that a particular defendant
14 is a conspirator, then however limited his or her role
15 in furthering the objectives of the conspiracy is, he
16 or she is responsible **for all that was done**
17 in furtherance thereof before and during its continuance.

18 A conspiracy once formed is presumed to have
19 continued until its objectives are accomplished or there
20 is an affirmative act of termination by its members or
21 it is otherwise terminated, as, for example, by arrest
22 or discovery. So, too, once a person is found to be a
23 member of a conspiracy he is presumed to continue his
24 membership until its termination, unless there is an
25 affirmative proof offered of withdrawal or disassociation.

2 While the indictment charges that the conspiracy
3 existed from on or about the second day of April, 1973,
4 and continuously thereafter up to and including the
5 date of the filing of the indictment, it is not essential
6 the Government prove the conspiracy started and ended
7 on those specific dates. It is sufficient if you find
8 that in fact a conspiracy was formed and existed for
9 some time within the period named in the indictment.
10 And that at least one of the overt acts was committed
11 in furtherance thereof within that period.

12 You will recall that there is some evidence
13 as to events taking place on or prior to April 18, 1973,
14 which I permitted you to receive, as to conversations
15 between the defendant Navedo and Angel Rodriguez, the
16 BHDD agent, where the defendant Reyes was not present.
17 Ordinarily, such testimony wouldn't be permitted under
18 what is generally referred to as the hearsay rule.
19 There is an exception to the hearsay rule which applies
20 in this case as to matters which did not take place in
21 the presence of the defendant Reyes, but which happened
22 on or prior to April 18, 1973. The Government contends
23 that Reyes and Navedo, as well as Roy, were involved in
24 an illicit or illegal enterprise, that they were acting
25 in concert in an enterprise that had a common purpose,

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2 which was to possess with intention to distribute and
3 distribute cocaine.

4 Under the circumstances of this case, you may
5 treat Navedo as the agent of the defendant Reyes, and
6 the acts and statements and conduct of Navedo in
7 furtherance of the illicit enterprise and during its
8 existence which may be considered the acts of the defendant
9 Navedo. If you find upon all the evidence beyond a reasonable
10 doubt that the defendant whose guilt or innocence you are
11 considering was a member of a joint illicit enterprise, and
12 that the person whose acts or statements are being considered
13 by you in connection with that person's guilt or innocence
14 was also a member at that time:

15 I charge you as a matter of law any joint
16 illicit enterprise ended on April 18, 1973, by reason
17 of discovery, and anything said or done in the absence
18 of any defendant after that date may not be considered
19 as evidence of guilt as to an absent defendant.

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2 You may consider and weigh Navedo's subsequent
3 words and actions after April 18, 1973, and particularly
4 his interview with United States Justice Department
5 Attorney Pyckett, solely in connection with the question
6 of his guilt or innocence and not with respect to the
7 guilt or innocence of Reyes, because by the time a
8 statement was made to United States Attorney Pyckett,
9 if it was made, the conspiracy or joint illicit venture,
10 if one did exist, had terminated because of discovery.

11 Count Two is a separate charge solely against
12 defendant Navedo, Rafael Navedo. In this regard the
13 indictment reads as follows:

14 "Second Count: The grand jury further charges
15 on or about the 18th day of April, in the Southern District
16 of New York, Rafael Navedo, the defendant, did unlawfully,
17 wilfully and knowingly carry a firearm during the
18 commission of a felony for which he could be prosecuted
19 in a court of the United States, to wit, Title 21, United
20 States Code, Section 846."

21 In order to prove this charge the Government
22 must prove each of the following elements beyond a
23 reasonable doubt. First, that on or about April 18,
24 1973, Rafael Navedo was carrying a firearm -- that is,
25 the pistol which has been received in evidence here --

2 second, that he was carrying said firearm unlawfully,
3 and, third, that he was carrying it during the commission
4 of a felony for which he might be prosecuted in a federal
5 court.

6 Now, regarding the first element, I instruct
7 you that a firearm is defined as any weapon which will
8 expel a projectile. That is to say a bullet -- by the
9 action of an explosive, such as gun powder.

10 Concerning the second element, you must
11 determine whether the defendant carried the firearm
12 unlawfully. In this regard, there has been a stipulation
13 that the defendant did not have a New York license to
14 possess or carry the firearm, so there is no dispute
15 on that issue.

16 It has further been stipulated that the pistol
17 was and is in workable condition -- that is to say it
18 may be fired.

19 I charge you that as a matter of law it is
20 unlawful in the State of New York to possess a pistol
21 without having a license issued by the State of New York.

22 To convict on this charge you must be satisfied
23 beyond a reasonable doubt that the defendant knew what
24 he was doing, that he did it deliberately and voluntarily
25 as opposed to doing it mistakenly or accidentally, or

2 as the result of some coercion.

3 Of course, it is not necessary that he knew
4 that he was violating any particular law. Rather, it
5 is sufficient if you are convinced beyond a reasonable
6 doubt that he was aware of the general unlawful nature
7 of his act.

8 Now, the felony for which a defendant may be
9 prosecuted in a court of the United States which is
10 relied on in connection with Count Two is the crime of
11 conspiracy set forth in Count One. I charge you that
12 that crime is a felony, and it is a felony which may
13 be prosecuted in the federal courts.

14 If Mr. Navedo is acquitted of Count One, he
15 must be acquitted of Count Two, but that is not to say
16 the reverse. It is possible that the jury might find
17 the defendant guilty with respect to Count One and
18 nonetheless acquit him with respect to Count Three.

19 But the gist of Count Two is that it is unlawful
20 to carry a gun unlawfully during the commission of a
21 federal felony, and to do so knowingly and wilfully.

22 Now I am coming to Count Three, and I must
23 say to you , you should not be confused between the two
24 counts because the same gun figures indirectly in the
25 third count.

2 The third count, the grand jury further charges
3 on or about the 18th day of April, 1973, in the Southern
4 District of New York, Rafael Navedo, the defendant,
5 unlawfully, wilfully and knowingly did forcibly assault,
6 resist, oppose, impede, intimidate and interfere with
7 by use of a deadly and dangerous weapon, to wit, a
8 revolver, William Rawald, a person aiding; acting with,
9 and on behalf of persons designated in Section 111⁴ of
10 Title 18, United States Code, to wit, officers and
11 police of the Bureau of Narcotics and Dangerous Drugs,
12 while William Rawald and said officers and police were
13 engaged in and on account of the performance of their
14 official duties.

15 In order to find Mr. Navedo guilty of the crime
16 charged in Count Three, you must find the following facts
17 beyond a reasonable doubt.

18 First, that on or about April 18, 1973, Sergeant
19 William Rawald, who testified before you, was a New York
20 police officer assigned to and working for and under the
21 control of the New York Joint Task Force, an agency of
22 the United States Department of Justice, Bureau of
23 Narcotics and Dangerous Drugs.

24 The second element of the crime: That on the
25 same date the defendant forcibly assaulted or resisted

2 or opposed or impeded or intimidated or interfered with
3 Sergeant William Rawald.

4 Third, that the defendant wilfully did the act
5 or acts charged, and, fourth, that at the time Sergeant
6 Rawald was acting in the performance of his official
7 duties.

8 Regarding the first element, I instructed you
9 as a matter of law that a New York police officer
10 assigned to the New York Joint Task Force on Narcotics,
11 a federally controlled organization, was acting in
12 cooperation with an under control of federal officers
13 and as such was a person protected by the statute.

14 You are instructed that it is not necessary
15 for the Government to prove that the defendant assaulted,
16 resisted, opposed, impeded, intimidated and interfered
17 with Sergeant Rawald as charged in the indictment. It
18 is sufficient if you find beyond a reasonable doubt that
19 the defendant did any one or more of the acts charged --
20 that is, that he assaulted or resisted or opposed or
21 impeded or intimidated or interfered with Sergeant
22 Rawald by a show of force, using a firearm.

23 In this regard, the fact that it is described
24 as a revolver and is in fact a pistol is not a material
25 variance and nothing with which you need be concerned.

2 To assist you with respect to Count Three, I
3 will define each of the acts as charged in each count
4 of the indictment.

5 An assault is defined as an unlawful attempt or off
6 with force and violence to do injury to the person of
7 another, coupled with such apparent present possibility of
8 carrying out such an attempt as to put the person
9 against whom the attempt was made in fear of personal
10 violence. Pointing a loaded gun at somebody could
11 constitute an assault.

12 The word resistance is defined as follows: To
13 oppose by physical power, to strive against, to exert
14 one's self to counteract defeat or frustrate.

15 The word oppose means to resist by physical
16 means.

17 Impede is defined as stopping progress, to
18 obstruct, hinder.

19 Intimidate is described as follows: To make
20 timid or fearful, to inspire or affect with fear, to
21 frighten, to deter or overawe, to cow somebody.

22 Interfere means to come into collision with,
23 to intermeddle, to hinder, to interpose or intervene.

24 To prove the offense here charged the Government
25 is not required to prove that the defendant Navedo knew

2 that Sergeant Rawald was an officer of the Bureau of
3 Narcotics and Dangerous Drugs.

4 You will recall that in stating the elements
5 of the crimes charged I said that before you can convict
6 the defendants of the crimes charged in the indictment
7 you must, as one of the elements of each count as to
8 each defendant find beyond a reasonable doubt that he or
9 she acted knowingly and wilfully.

10 I direct your attention to the words knowingly
11 and wilfully for the question is, what do these words
12 mean? Is there something mysterious or complicated
13 about the words knowingly and wilfully?

14 First, let me instruct you as to what these
15 words don't mean. They don't mean that the Government
16 has to show that each of the defendants knew they were
17 breaking a particular law before they can be convicted
18 of a crime. They don't mean that the Government has to
19 show that the defendant intended to profit at the expense
20 of the Government or any other person. Nor do they have
21 anything to do with his personal or private reasons for
22 violating a statute.

23 If after considering all the evidence in
24 accordance with my instructions to you, you come to the
25 conclusion that a defendant violated the statute, then

2 in that event the defendant's personal or private reasons
3 for violating the statute are of no consequence so far
4 as his guilt is concerned.

5 I instruct you that these words knowingly and
6 wilfully mean deliberately, they mean intentionally.
7 The words knowingly and wilfully are opposed to the
8 idea of an inadvertence or an accidental act.

9 Knowledge and intent exist in the mind. It
10 is not possible to look into a person's mind to see
11 what went on. So the only way you have for arriving at
12 a decision in these questions is to take into considera-
13 tion all the facts and circumstances shown by the
14 evidence, including the exhibits. And to determine
15 from such facts and evidence and circumstance whether
16 the requisite knowledge and intent were present at the
17 time in question.

18 Direct proof is not necessary. Knowledge and
19 intent may be inferred from all the surrounding circum-
20 stances.

21 As far as intent is concerned, you are instructed
22 a person is presumed to intend the natural and probable
23 or ordinary consequences of his acts. An act is done
24 knowingly if it is done voluntarily and purposely. And
25 not because of mistake, accident, mere negligence, or

2 some other innocent reasons.

3 An act is done wilfully if it is done knowingly
4 and deliberately. Wilfully does not mean that the
5 defendant in addition to knowing what he was doing must
6 also suppose he was breaking the law.

7 A word about the matter of false exculpatory
8 statements. There has been testimony that at his post-
9 arrest interview Mr. Navedo may have made statements
10 tending to show that he was never at 1581 Fulton Avenue
11 in the Bronx on April 18, 1973, where the alleged assault
12 took place, but that he had stayed at the club and then
13 taken a taxi to his home to get money for his singer,
14 and that when he arrived he was arrested. In other
15 words, that he told United States Attorney Pickett that
16 he did not go to that address by truck.

17 There has also been testimony that these
18 statements were false in that Navedo was seen leaving
19 the social club on the early morning of April 18, 1973,
20 and entering a truck driven by another male, and that
21 the truck proceeded to 1581 Fulton Avenue where Navedo
22 pointed a pistol at Sergeant Rawald.

23 I charge you that exculpatory statements when
24 shown to be false are circumstantial evidence of guilty
25 consciousness and of independent probative force, and

2 may be so considered by the jury in considering the
3 guilt or innocence of Mr. Navedo. They may not, however,
4 be considered in your determination with respect to the
5 guilt or innocence of Miss Reyes.

6 Under your oath as jurors you cannot allow
7 any consideration of the punishment which may be inflicted
8 upon a defendant, if convicted, to influence your verdict
9 in any way, or in any sense enter into your deliberations.
10 The duty of imposing sentence rests exclusively upon
11 the Court. Your function is to weigh the evidence in
12 the case and to determine the guilt or innocence of the
13 defendants solely upon the basis of such evidence and
14 the law. You are to decide the case upon the evidence
15 and the evidence alone, and you must not be influenced
16 by any assumption, conjecture or sympathy or any inference
17 not warranted by the facts until proven to your
18 satisfaction.

19 If you fail to find beyond a reasonable doubt
20 that the law has been violated as to any defendant or
21 any count, you should not hesitate for any reason to
22 find a verdict of acquittal, but, on the other hand, if
23 you should find that the law has been violated as
24 charged, you should not hesitate because of sympathy or
25 any other reason to render a verdict of guilty as a clear

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2 warning that a crime of this character may not be
3 committed with impunity. The public is entitled to be
4 assured of this.

5 For your guidance in considering the evidence
6 you have heard, I must tell you there are two classes
7 of evidence recognized and admitted in courts of justice,
8 upon either of which the jurors may find an accused
9 guilty of a crime. One is called direct evidence, and
10 the other is called circumstantial evidence. Direct
11 evidence tends to show the fact in issue without the
12 need of any other affirmation, although of course there
13 is also the question as to whether it is to be believed.
14 Circumstantial evidence is evidence that tends to show
15 facts from which the fact in issue may reasonably be
16 inferred. It is evidence which tends to prove the fact
17 in issue by proof of other facts which have a legitimate
18 tendency to lead the mind to infer that the facts sought
19 to be established are true.

20 For instance, a traditional example: Some
21 times it is difficult to tell merely by looking out the
22 window whether it is raining outside or not. But if
23 you look out and you see people passing by in the streets
24 with their umbrellas up you will generally come to the
25 conclusion that it is raining. You have direct evidence,

2 the evidence of your own eyes that the umbrellas are
3 up, and that constitutes circumstantial evidence from
4 which you are entitled to conclude that it is raining.
5 In other words, circumstantial evidence consists of
6 facts proved from which the jury may infer by a process
7 of reasoning other facts in issue. Circumstantial
8 evidence, if believed, is of no less value than direct
9 evidence, for in either case you must be convinced
10 beyond a reasonable doubt.

11 Now, if you find that any witness has testified
12 falsely and done so wilfully as to a material fact, you
13 may but you need not disregard the entire testimony of
14 that witness, on the principle that one who testifies
15 falsely about one material fact may testify falsely
16 about everything. But you are not required to consider
17 such a witness as totally unworthy of belief. You may
18 accept such of his testimony as you deem true, and
19 disregard what you believe is false. You as sole judges
20 of the facts determine which of the witnesses you will
21 believe, what portion of their testimony you will accept,
22 and what weight you will give to it. That is your
23 function as jurors.

24 In doing so you must make your own evaluation
25 of the testimony given by each of the witnesses, and

2 determine what you believe to be the truth and the
3 degree of weight you choose to give to that testimony.
4 Testimony of a witness may fail to conform to the truth
5 because the witness is intentionally telling a falsehood
6 or because the witness did not accurately see or hear
7 what he testified about, or because his recollection of
8 the event is faulty, or because he has not expressed
9 himself clearly in giving his testimony. There is no
10 magic formula by which you can evaluate testimony. You
11 bring into the jury room all the experience and background
12 of your lives. In your everyday affairs each of you
13 determines for yourself the reliability of statements
14 made to you by others. The same tests you use in your
15 everyday dealings are the tests that you apply in your
16 deliberation.

17 You may, of course, consider the interest or
18 lack of interest of any witness in the outcome of this
19 case. A witness who is interested in the outcome of a
20 case is not necessarily unworthy of belief, but interest
21 of a witness is a factor or a possible motive which you
22 may consider in determining the weight or credibility
23 to be given his testimony.

24 In doing this you may also consider whether
25 the testimony of a witness is corroborated by the testimony

2 of others or by documentary evidence or by exhibits.

3 You may consider possible bias or prejudice of a witness
4 if there be any, and the manner in which the witness gives
5 his testimony on the stand, the appearance and conduct
6 of the witness in giving his testimony, the opportunity
7 the witness had to observe the facts concerning which
8 he testified, and the probability or improbability of
9 the testimony in the light of all the other events in
10 the case.

11 These are all items to be taken into your
12 consideration in determining truthfulness and weight,
13 if any, which you will assign to the witness's testimony.
14 If such considerations make it appear there is a dis-
15 crepancy you will have to consider whether this may be
16 reconciled by fitting the two witnesses' testimony
17 together. If that is not possible you will then have
18 to determine which of the conflicting versions you will
19 believe.

20 I am almost at the end, members of the jury.
21 I want to say a word to you before deliberating. Each
22 juror is entitled to his or her own opinion. Each
23 should, however, exchange views with the fellow jurors.
24 That is the very purpose of jury deliberations, to
25 discuss and consider the evidence, to listen to the

2 arguments of fellow jurors, to present individual views
3 and to consult with one another and reach a verdict
4 based solely and wholly on the evidence, if you can do
5 so without violence to your own individual judgment.

6 Each one must decide the case for himself or
7 herself after consideration with your fellow jurors,
8 but you should not hesitate to change an opinion which
9 you may hold which after discussion with your fellow
10 jurors appears erroneous in the light of the discussion
11 viewed against the evidence and the law. However, if
12 after carefully weighing all the evidence and arguments
13 of your fellow jurors you entertain a conscientious view
14 that differs from the rest, you are not to yield your
15 judgment and go along simply because you are outnumbered
16 or outweighed or outvoted, because your final vote must
17 reflect your individual conscientious judgment as to
18 how this case should be decided.

19 In order to find a verdict as to any defendant
20 as to any count it must be unanimous. In the course of
21 your deliberations you may want some part of the
22 testimony read to you, or you might find you are uncertain
23 as to something I may have said in my instructions, or
24 you may wish to examine an exhibit. In any such case
25 you send out a note through your foreman asking for

2 whatever will clear up any questions which you may have.

3 When writing such a note and communicating
4 with the Court I should admonish you, do not indicate
5 in the note how the vote is then divided, because I
6 do not want to know how the vote is then divided unless
7 and until you have reached a unanimous result.

8 Your foreman will be Mrs. Zagoreos, and she
9 will send out any communications from the jury by
10 delivering a note to the Marshal. Let me state, finally,
11 that your oath sums up your duty, and that is without
12 fear or favor to anyone you will well and truly try the
13 issues between these defendants and the Government of
14 the United States based solely on the evidence and
15 following the Court's instructions as to the law.

16 It is important to each of the defendants, it
17 is important to the Government.

18 Mr. Clerk, will you swear the Marshal?

19 (Marshal sworn at 3:30 p.m.)

20 THE COURT: At this time, Mr. Danenberg and
21 Miss Acevedo are excused, because it develops we won't
22 need them. I certainly thank you for your attendance
23 here and the careful attention you have paid to the case.

24 Will you both please go directly to Room 109.
25 You may withdraw from the jury box.

2 Members of the jury, I will ask the rest of
3 you to remain seated where you are briefly while I confer
4 with the attorneys to see if there is any additional
5 instruction they would like to have me mention to you,
6 or if there is anything I may not have covered in my
7 present statement. In this regard, I ask you not to
8 discuss the case while seated in the box, because there
9 is the possibility that I might find it proper to give
10 you additional instructions which you may not presently
11 have received.

12 Please remain where you are for a few moments.

13 Counsel and the Reporter, please step inside.

14 (In the robing room.)

15 THE COURT: Do you have any additional requests?

16 MR. LAVIN: No, your Honor.

17 THE COURT: Mrs. Hermann?

18 MRS. HERMANN: Yes, your Honor. In the charge
19 regarding conspiracy I would except at this time to your
20 charge on the nature of the agreement and the acts in
21 furtherance of the conspiracy for not charging as I
22 requested.

23 THE COURT: You have an exception insofar as
24 my charge does not constitute substantial compliance to
25 anything contained in your formal requests in Court's

2 Exhibit 3 for identification, and of course the same
3 goes for you, Mr. Solomon, with respect to Exhibit 2.
4 You have an exception to any extent where I did not
5 track in substantially the same meaning anything which
6 you have in your formal requests.

7 MR. SOLOMON: I wanted to call your attention
8 specifically on the record.

9 THE COURT: It is identified as an exhibit.

10 MR. SOLOMON: You are referring to Court's
11 Exhibit 2?

12 THE COURT: That is right. My failure to
13 charge anything in there you have an exception to, and
14 the same goes for Mrs. Hermann with respect to Exhibit 3.

15 MRS. HERMANN: There was a point where you were
16 charging on conspiracy about the meeting of the minds
17 where you stated in effect that if the minds met then
18 the conspiracy is complete, which I think suggested
19 that there was no necessity for the Government to prove
20 an overt act, though you did charge separately on overt
21 acts.

22 THE COURT: I thought I said that that element
23 had been satisfied if the minds are met. I am sure I
24 didn't say they didn't need overt acts.

25 I will stand on the record in that regard, and

2 if I did such a thing you have an exception.

3 MRS. HERMANN: Also, the charge which I think
4 tracked fairly closely the language suggested by Mr.
5 Lavin suggested as it spoke of defendants and conspirators
6 in the plural many times in the context of the conspiracy
7 charge, seemed to me to suggest a larger group of
8 conspirators than would be possible in this case.

9 THE COURT: I think I told them that there
10 were only three possible conspirators, that those three
11 were the mysterious fellow known as Roy and the two
12 people on trial. I thought I had covered that expressly.

13 MRS. HERMANN: You did cover that expressly.

14 THE COURT: I decline to charge any further
15 or differently in that regard, and you may have an
16 exception.

17 MRS. HERMANN: Then there was a point at which
18 you were talking about that if they were to acquit the
19 conspiracy charge then they couldn't convict of Count
20 Two, but you were saying that the converse was not true,
21 that is, that they could convict of Count One and then I
22 am sure you meant to say Count Two, but what you did say
23 was acquit of Count Three.

24 THE COURT: Didn't I correct myself on that?

25 If I said that, I merely mis-spoke. That was

2 a mistake and I will certainly correct one.

3 MRS. HERMANN: I want to except to the charge
4 on the false exculpatory statements.

5 THE COURT: Yes, certainly.

6 MRS. HERMANN: And to your charge that sympathy
7 should not affect them, and that --

8 THE COURT: That has been approved time and
9 again in this Circuit, but you have an exception.

10 MRS. HERMANN: You know the part to which I
11 am referring.

12 THE COURT: Yes, the public is assured that
13 they will do their duty. All right.

14 MR. SOLOMON: Your Honor, there are two. It
15 is my recollection that during Mr. Lavin's summation he
16 said the following: "Rodriguez testified that he used
17 the word cocaine", that is referring to the statement --

18 THE COURT: That is, Rodriguez, used the word
19 cocaine, yes.

20 MR. SOLOMON: To Reyes.

21 THE COURT: He said perico.

22 MR. SOLOMON: And Mr. Lavin made one further
23 statement about that. He said, "There was no denial of
24 that by her", meaning to infer that she didn't deny
25 that statement.

2 Now, if my recollection is correct in my opinion
3 that is an impermissible comment on the defendant's
4 failure to testify. Do you remember saying that, Mr.
5 Lavin?

6 THE COURT: I thought he started to say that.

7 MR. LAVIN: I did say that, but it is taken
8 out of context.

9 THE COURT: I thought he saved himself at the
10 tail end of the sentence.

11 MR. SOLOMON: Maybe I didn't catch it.

12 THE COURT: I thought he did, because I was
13 rather outraged when the sentence came out, and then I
14 think he watered it out to where that inference is not
15 permissible. I think it would be a mistake for me to
16 meddle with it further now. I think anything I say
17 would only make it more difficult. You will have to
18 read the whole sentence.

19 MR. SOLOMON: If your Honor thinks it was
20 corrected --

21 MR. LAVIN: What I was talking about was she
22 didn't deny it on the phone call, not at any other time,
23 and I thought I made it clear.

24 THE COURT: It may be borderline, Mr. Solomon,
25 but I really don't think I would improve the record by

2 saying anything.

3 MR. SOLOMON: When your Honor was charging
4 the presumption of innocence you repeatedly used the
5 word "him", "his", in his favor.

6 Now you didn't use the word "her".

7 THE COURT: I will correct that. I tried very
8 hard to do that, and I will tell them that wherever I
9 said he or she I meant to say he or she.

10 MR. LAVIN: Your Honor, I thought I heard you
11 say on circumstantial evidence you can find either of
12 those to find an accused guilty of a crime.

13 THE COURT: What I said was, circumstantial
14 evidence if believed is of no less value than direct
15 evidence, for in either case you must be convinced beyond
16 a reasonable doubt of the guilt of a defendant. That is
17 as far as I know.

18 MR. LAVIN: That is not the part I am talking
19 about. There was another part.

20 THE COURT: I really think you mis-heard me.
21 I used this particular typewritten page a great number
22 of times. I might have mis-spoken, but I am not conscious
23 of it.

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2 (In open court. Jury present.)

3 THE COURT: Members of the jury, there are two
4 additional things I would like to mention to you.

5 In our definitions of various matters which
6 I mentioned to you I am conscious of the fact that
7 ordinarily I said he or she, or him or her, whenever
8 that was applicable. However, occasionally I just said
9 he or him. Now, I would like you to consider all of
10 my instructions, wherever the context requires, if I said
11 he I meant to apply that instruction to each defendant,
12 whether the person is a man or a woman. I know in our
13 common speech we very often make general statements, and
14 we just use the masculine gender in our language, but
15 that is not my intention, and we haven't yet modified
16 our proceedings so we refer to chairperson, I have
17 referred to our forelady as foreman in my discussion,
18 and I hope you will understand that the instructions I
19 have given apply equally to each defendant, whether I
20 said he or she or him or her, or merely said he or him.

21 Is that clear?

22 Now, one other thing, I mis-spoke myself with
23 respect to Count Two. It has been called to my attention,
24 and I would like you, Mr. Deutsch, if you would, to
25 please read back the erroneous statement I made, and I

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2 will correct it.

3 (The record was read by the Reporter.)

4 THE COURT: It must be clear to you members of
5 the jury at that time I was talking about Count Two,
6 and the last word I meant to say in that matter that was
7 quoted to you was Two, and not Three. I didn't begin
8 to discuss Three until later on, in my instructions.

9 So that it is, to go over it again, it is
10 possible for the jury -- this is your verdict -- to find
11 Mr. Navedo guilty of both Counts One and Two. It is
12 possible for you to acquit on Count One, in which event
13 you must acquit on Count Two. But if you convict on
14 Count One, you don't necessarily have to convict on
15 Count Two, and where I said Three in those instructions
16 I was really talking about Two, I mis-spoke myself, we
17 are all human, we all make mistakes, and I hope you will
18 understand I have now corrected it.

19 All right, members of the jury, you may now
20 withdraw to your jury room and commence your deliberations.
21
22
23
24
25

2 (In open court, jury present, at 4:40 p.m.)

3 THE COURT: This will be Exhibit 4.

4 (Court Exhibit 4 marked for identification.)

5 THE COURT: Members of the jury, I have your
6 note which has been marked a Court's Exhibit for
7 identification as Number 4. The note says, "May we have
8 an explanation on Counts Two and Three."

9 By explanation I assume that you would like
10 to have me read them again and to go over the basic
11 elements of each charge, and I will do that. However,
12 if after returning to your jury room you find that that
13 is not sufficiently complete for you, of course you may
14 request further information and I would read my entire
15 charge, if you wanted me to, but I really don't think
16 that is necessary, unless you ask for it.

17 In Count Two, it reads as follows:

18 "The grand jury further charges on or about
19 the 18th day of April, in the Southern District of New
20 York, Rafael Navedo, the defendant, did unlawfully,
21 wilfully and knowingly carry a firearm during the commis-
22 sion of a felony for which he could be prosecuted in a
23 court of the United States, to wit, Title 21, United
24 States Code, Section 846."

25 Congress has made it a separate crime to

2 unlawfully, wilfully and knowingly carry a firearm while
3 you are committing some other crime which is a federal
4 felony -- that is, one which could be prosecuted in a
5 court of the United States. So the basis of this charge
6 is that the defendant Rafael Navedo was engaged in a
7 conspiracy, a cocaine conspiracy, as charged in Count
8 One, and that while he was so engaged in it he carried
9 a gun with him, a firearm.

10 If you find the defendant Rafael Navedo innocent
11 of the first count, the conspiracy count, then you must
12 acquitt him on the second count.

13 If you find him guilty on the first count,
14 then you will commence to consider whether the Government
15 has proved to your satisfaction beyond a reasonable doubt
16 all of the elements of the second count.

17 Here is what those elements are. First, that
18 on or about April 18, 1973, Rafael Navedo was carrying
19 a firearm -- that is, a pistol, a pistol that has been
20 received in evidence here. Second, that he was carrying
21 it unlawfully, that is to say, he didn't have a permit
22 or some other status which entitled him to carry it.
23 And, third, that he was carrying it during the commission
24 of a felony for which he might be prosecuted in a federal
25 court. In this case, this cocaine conspiracy charge,

2 which is a federal felony.

3 I defined a firearm for you, and I am sure
4 you are all familiar by now with what a firearm is.

5 I explained to you generally what was meant
6 by wilfully and knowingly, and I will go over those
7 words again if the jury asks for it, but I believe I
8 defined those words, and I pointed out to you there was
9 a stipulation he had no State license to carry the gun.

10 That I think will state for you the elements
11 of the issues for your discussion in connection with
12 Count Two.

13 Now I will go on to Count Three. Count three
14 is an entirely separate charge, a separate crime, and
15 Count Three is to be decided wholly without regard to
16 how you decide One or Two. It makes no difference what
17 verdicts you reach on Counts One or Two as to Mr. Navedo,
18 you still will consider the third count just as if it
19 were entirely new, separate case, each count is a separate
20 charge, and to be considered separately by the jury,
21 although it happens to involve the same gun. There the
22 charge is that on or about the 18th day of April, 1973,
23 in the Southern District of New York, Rafael Navedo,
24 the defendant, unlawfully, wilfully and knowingly did
25 forcibly assault, resist, oppose, impede, intimidate and

1 mdkm

280

2 interfere with by use of a deadly and dangerous weapon,
3 to wit, a revolver, William Rawald, a person aiding,
4 acting with and on behalf of persons designated in
5 Section 1114 of Title 18, United States Code, to wit,
6 officers and police of the Bureau of Narcotics and
7 Dangerous Drugs, while William Rawald and said officers
8 and police were engaged in and on account of the
9 performance of their official duties.

10 With respect to Count Three, these are the
11 elements of which you must be satisfied beyond a reasonable
12 doubt.

13 First, that on that date, April 18, Rawald was
14 a New York police officer assigned to and working for,
15 on loan to, that is, the New York Joint Task Force, which
16 I told you was an agency of the United States Department
17 of Justice in the Bureau of Narcotics and Dangerous Drugs.

18 Second, that on that same date the defendant
19 forcibly assaulted or resisted or opposed or etcetera,
20 or interfered with Sergeant Rawald.

21 Third, that the defendant wilfully did so.
22 And, fourth, that at that time Rawald was acting in the
23 performance of his official duties as an agent or special
24 agent of the Bureau of Narcotics and Dangerous Drugs.

25 Now, I told you that they didn't have to prove

2 each one of those words, assaulted, resisted, opposed,
3 impeded, and interfered with. Proof of any one beyond
4 a reasonable doubt, that is he assaulted or resisted or
5 opposed Sergeant Rawald would be sufficient if he did so
6 by some show of force.

7 I defined an assault for you, and basically
8 pointing a loaded gun at somebody, and if it is done
9 wilfully and knowingly with the intention of making a
10 show of force against that person, could constitute
11 assault.

12 I also defined the other words, but the
13 principal gravamen of the charge here relates to pointing
14 the gun at him, and that, if he did it knowingly and
15 wilfully and intending to make a show of force, could
16 constitute an assault.

17 I instructed you that as to Count Three, the
18 Government was not required to prove that the defendant
19 Navedo knew that Sergeant Rawald was an agent from the
20 Bureau of Narcotics and Dangerous Drugs.

21 Again, as far as the definitions of wilfully
22 and knowingly, I covered those separately with respect
23 to each different count here, and I would repeat them
24 if the jury wants it and sends out another note. Of
25 course the same goes for anything else that you may want.

2 I trust I have covered your items of your query.
3 If not, please provide another note, and you may withdraw
4 from the courtroom and continue your deliberations.

5 (Jury excused at 4:50 p.m.)

6 THE COURT: We will be in recess.

7 (Recess.)

8 (In open court, jury present, at 5:50 p.m.)

9 THE CLERK: Madam Forelady, have you agreed
10 upon a verdict?

11 THE FORELADY: We have.

12 THE CLERK: What is your verdict as to
13 defendant Navedo on Count One?

14 THE FORELADY: Guilty.

15 THE CLERK: Count Two?

16 THE FORELADY: Guilty.

17 THE CLERK: Count Three?

18 THE FORELADY: Guilty.

19 THE CLERK: What is your verdict as to defendant
20 Reyes on Count One?

21 THE FORELADY: Not guilty.

22 THE COURT: Ladies and gentlemen of the jury,
23 listen to your verdict as it stands recorded. You say
24 you find the defendant Navedo guilty on Counts One, Two
25 and Three, and the defendant Reyes not guilty on Count One.

JPL:ilf

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
UNITED STATES OF AMERICA

-v-

RAFAEL NAVEDO, et al.,

S 73 Cr. 964

Defendants

-----x
MEMORANDUM OF LAW

On December 11, 1973 the defendant Rafael Navedo plead guilty to Count One of superseding Indictment 73 Cr. 964. That count charged Navedo and others with conspiracy to violate the federal narcotics laws. Title 21, United States Code Section 846. Navedo at the time of his plea stated to the court that he and another person negotiated with an undercover agent for the sale of cocaine and that he delivered to the agent a quantity of white powder which he, Navedo, thought and intended to be cocaine. The white powder was later analyzed as procaine, a non-controlled substance.

In United States v. Heng Awkak Roman, 356

F. Supp. 434 (S.D.N.Y.), aff'd Slip Op. 1109-1117

(2d Cir. September 26, 1973) the defendants were found guilty by the trial court of attempting to possess with the intent to distribute narcotics even though the actual heroin had been earlier replaced with soap powder.

-----here we have a situation where the defendants actions would have constituted the completed crime if the surrounding circumstances were as they believed them to be. Under such circumstances, their actions constituted an attempt. Id at 437

See also United States v. Vilhotti, 452 F.2d 1186 (2d Cir. 1971), cert. denied, 406 U.S. 947 (1972).

The defendant Navedo admitted his participation in the conspiracy and further that he intended to and believed that he negotiated for and sold cocaine. The fact that the substance he sold was not a narcotic substance does not affect the criminal nature of his plea.

A conspiracy of course requires an agreement between two or more people and it is conceivable that Navedo was the only member of this conspiracy who

JPL:ilf

intended and believed that cocaine was being distributed.

See United States v. Cummins, 123 F.2d 271 (2d Cir.)

We submit however that the court is not required nor should it engage in speculation as to the state of mind of other co-conspirators. Furthermore Navedo told the court during his plea that there were further negotiations for the sale of additional cocaine subsequent to the delivery of the dummy package. However, the arrests took place before that transaction could be consummated.

Thus, it is evident from these subsequent negotiations and from Navedo's statements to the court that this was a conspiracy to sell cocaine even though the objects of the conspiracy were not attained. United States v. Rabinowich, 238 U.S. 78, 87-89 (1913).

CONCLUSION

The defendant Navedo's plea should be accepted by the court.

Respectfully submitted

PAUL J. CURRAN
United States Attorney for the
Southern District of New York
Attorney for the United States
of America

JAMES P. LAVIN
Assistant United States Attorney
of Counsel

STATEMENT OF DEFENDANT BEFORE ARRAIGNMENT
MADE TO ASSISTANT UNITED STATES ATTORNEY

Date: 4/14/75

Time Interview Commenced: a.m. 11:30 p.m.

- Q. My name is Dan Rybicki, I am an Assistant U.S. Justice United States Attorney. You have been arrested for a violation of 21 USC 846 which relates to Federal Narcotics Violation. In a few minutes you will be taken before the United States Magistrate who will fix bail in your case. Do you understand that?

A. No.

- Q. You have a constitutional right to refuse to answer any of my questions. Do you understand that?

A. Yeah.

- Q. You have an absolute right to remain silent, and if you choose to answer any questions, any statement you do make can be used against you in a court of law. Do you understand that?

A. No.

Q. You have a right to consult an attorney and to have that attorney present during this interview. Do you understand that?

A.

Yes

Q. If you do not have funds to retain an attorney an attorney will be appointed to represent you and you do not have to answer any questions before this attorney is appointed and you can consult with him. Do you understand that?

A.

I don't have enough money for a lawyer

Q. Understanding your rights as I have explained them, do you want to give me some information at this time about your background and your version of the facts?

A.

No

Form No. USA 33s-306 p.2
Rev. 6-28-66

Name: John Nevado Marital Status: Separated Age: 40
Aliases: Ralph - "El Malico" Date: Dec 2, 1966

Children: Other Dependents:

Address: 3363 Seigwick Ave Apt. No. 1C Rent: \$262 Period: 3 $\frac{1}{2}$ mos.
Bronx

With Whom Residing:
Miguelina Reyes + Luis & Eddie Nevado (2 children)

Citizen of: U.S. Registered as an Alien:

Entry to U.S. Registered with Selective Service
Military Service, Discharge:

Employed: Unemployed Wages: \$185 - \$200 per week
but part owner of a Social Club.

Previous Record: Mi Casa Social Club - 892 East 176th St BX.

2 prior arrests - 1 misdemeanor narcotics ~~conviction~~ conviction.
Prosecution declined on other. -

Addict:

No.

*and
a few*

Defendant's Statement:

This one guy, the owner of the cocaine, called me at the club last night every $\frac{1}{2}$ hour and asked me if I knew someone who wanted to buy the cocaine. This other guy called me and wanted to buy $\frac{3}{8}$. The sale was supposed to be at the apartment where the first sale was but the guy who owned the cocaine said he was going to send somebody else to the apartment - I guess he didn't trust me with so much money. I was only going to get a few dollars - about \$100.00. The guy who was going to buy it showed up at the apartment. I took an elevator down to get some money to go to the club and the guy who was going to buy it showed up at my door.

Defendant's Statement continued:

the first time & this guy brought the cocaine and we met with the same guy who was going to buy last night -(pointing to Bill Murphy)- his partner - The only thing I did was take the package from the guy who brought it and give it to his partner - (looking at Bill Murphy) Then he gave the money to the other guy. I got \$75 or \$85 for pointing the guy out..

Time Interview Terminated: 1⁰⁰ a.m. 1⁰⁰ p.m.

Witnessed: Assistant U.S. Attorney D. J. Platt

Agents: Bill Murphy

Bail recommended:

\$50,000 Cash & Surety.

Bail set by Magistrate:

\$10,000 Cash & Surety

Hearing:

April 27, 1973

10 A.M.

Possible bail suggested by defendant:

Time of arraignment: 1³⁰ a.m. 1³⁰ p.m.

Legal off - M. Itman
arranged

D + wife doing OK - Signs

Buy car etc.

Reno.

Guits.

Club - "Roy" put in telephone in Club.

Guy - "Roy" put in telephone in Club.

D answers, etc. can use.
Then Roy starts talking about drug -
Says have drug. Makes puccini at home.
When ph. call, tell them you have
a cold.

1st del to Angelo says is ^{is success} \$24⁰⁰ for Roy.
Ask for \$3,000.
\$600 for guy who has house, Ralph.
\$50 for Naredo.

Often case
Arrested D Buy + 14th looking for a job.

Lost slip of paper. Goes to building.
FBI button, into apt. arrested.
Nothing to do with Roy or drug. Is a pre-Roy time.

Roy - ^{end} Feb - beginning March
2 or 3 mos before had met him.

Do peddlers & on phone always ^s first name.

Certificate of Service

July 3, 1974

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

E. Thomas Boyle